

**6070 USE OR POSSESSION OF A MASKING AGENT — § 961.69(2)****Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime for a person to use, or possess with the primary intent to use, a masking agent.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant [used] [possessed with the primary intent to use] a substance or device.

["Possessed" means that the defendant knowingly had a substance or device under his actual physical control.]

2. The substance or device was a masking agent.

A masking agent is any substance or device that is intended for use to defraud, circumvent, interfere with, or provide a substitute for a bodily fluid in conjunction with a lawfully administered drug test.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI Criminal 6070 was originally published 2016. This revision was approved by the Committee in April 2021; it added to the Comment.

This instruction is for possession or use of a masking agent in violation of § 961.69(2), which was created by 2015 Wisconsin Act 264, effective date: March 19, 2016. Subsection (3) of § 961.69 prohibits delivery, possession with intent deliver, or manufacturing with intent to deliver, a masking agent. Subsection (4) prohibits placing an advertisement to promote the sale of a masking agent. Uniform instructions have not been drafted for violations of subs. (3) and (4).

2013 Wisconsin Act 194 [effective date: April 9, 2014] created § 961.443. Under § 961.443, a defendant is entitled to immunity from criminal prosecution for possession of a masking agent if the charge stems from the act of rendering aid to a person believed to be suffering from a drug overdose. Specifically, § 961.443(2) provides:

An aider is immune from prosecution under under s. 961.69(2) for possession of a masking agent under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

The phrase “circumstances surrounding” means that the facts forming the basis for the possession of a masking agent charge must be closely connected to the events concerning the defendant rendering aid to an individual suffering from a drug overdose. State v. Lecker, 2020 WI App 65, 394 Wis.2d 285, 294, 950 N.W.2d 910.

An “aider” means a person who does any of the following:

(a) Brings another person to an emergency room, hospital, fire station, or other health care facility and makes contact with an individual who staffs the emergency room, hospital, fire station, or other health care facility if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(b) Summons and makes contact with a law enforcement officer, ambulance, emergency medical services practitioner, as defined in s. 356.01(5), or other health care provider, in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(c) Calls the telephone number “911” or, in an area in which the telephone number “911” is not available, the number for an emergency medical service provider, and makes contact with an individual answering the number with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog. Wis. Stat. § 961.443(1).

The legislature did not expressly provide in Wis. Stat. § 961.443 who should make the immunity decision and when that decision should be made. However, in State v. Williams, 2016 WI App 82, 372

Wis.2d. 365, 888 N.W.2d 1, the court held that the determination of immunity is to be made by the circuit court pretrial, not by the fact finder at trial. The burden is on the defendant to prove by a preponderance of the evidence that he or she is entitled to immunity. Id. at ¶14.

1. “Possess” is defined in Wis JI-Criminal 920 to require “actual physical control.” That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to “possession” in criminal cases, including so called constructive possession.

2. This is the definition of “masking agent” provided in § 961.69(1).